

REDACTED DECISION – DK#’S 23-1329

**BY: CRYSTAL S. FLANIGAN, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON APRIL 15, 2024
ISSUED ON OCTOBER 11, 2024**

FINAL DECISION

The Petitioner in this matter is a Limited Partnership that owns commercial properties and specifically, the AAA (hereinafter “AAA” or “Petitioner”). Upon learning of the proposed property tax values determined by the BBB County Assessor (hereinafter “Assessor” or “Respondent”), the Petitioner sought relief from the West Virginia Office of Tax Appeals.

Thereafter, on February 20, 2023, the Petitioner timely filed a property tax appeal with this Tribunal. The evidentiary hearing was held on November 28, 2023. After the filing of post hearing briefs, the record was closed on April 15, 2024, and the matter became ripe for decision at that time.

FINDINGS OF FACT

1. The Petitioner filed a Petition for Property Tax Appeal with the Office of Tax Appeals on February 20, 2023, challenging the appraised value for the 2023 tax year.

2. The property at issue in this appeal is known as the AAA and is owned by the Petitioner. Tr. 4.
3. The AAA is a multi-unit indoor shopping center that was built in 1990 and is situated in BBB County, West Virginia. Pet'r's Ex. 1.
4. Mr. CCC prepared the 2023 appraisal report dated July 26, 2023, for this matter and testified to his report during the evidentiary hearing. Pet'r's Ex. 1, Tr. 29-84, 142-157.
5. Mr. CCC was qualified as an expert by this Tribunal. Tr. 33.
6. Mr. CCC used five comparable sales for the capitalization rate for the market¹ comparison approach and the income capitalization approach. Pet'r's Ex.1.
7. Mr. CCC prepared the appraisal report based on the Uniform Standards of Professional Appraisal Practices. Tr. 34.
8. Mr. CCC visited the AAA on November 8, 2022. Tr. 35.
9. Mr. CCC prepared a market sales approach and income approach appraisal but did not include a cost approach appraisal. Tr. 38, Pet'r's Ex. 1.
10. Mr. CCC conceded that he did not consult the West Virginia Code of Regulations 110-IP-1 *et seq.* Tr. 60-61.
11. Mr. CCC testified that Assessors in West Virginia primarily appraised only residential property, not commercial property or malls. Tr. 64.
12. Mr. CCC testified that he was unfamiliar with a recent West Virginia case regarding the appraisal and assessment of malls in West Virginia. *Id.*
13. The Respondent used the Integrated Assessment System (hereinafter "IAS") to assess the Petitioner's property. Tr. 87-88, 100, 105.

¹ The terms market appraisal and sales appraisal refer to the same type of appraisal and are used interchangeably throughout this decision.

14. The Respondent valued the AAA for \$XX for the 2023 tax year using the IAS. Resp't's Ex. 1, Tr. 108.

15. Afterwards, the Respondent received the Petitioner's three most recent years of actual income showing increased annual income as follows: 2020- \$XX; 2021- \$XX; 2022-\$XX. Resp't's Ex.1, Tr. 21-22.

16. The Respondent then reduced his valuation to \$XX. Resp't's No. 1, Tr. 89.

17. The Petitioner's 2023 appraisal uses estimated income of \$XX. Tr. 117-118, Pet'r's No. 69-70.

18. The Petitioner's 2023 estimated income is less than the actual net income from 2020, 2021, and 2022. Pet'r's Ex. 1, 69-70.

19. Mr. CCC valued the subject property for the 2023 tax year at \$XX. Pet'r's Ex.1 at 69, Tr. 51.

20. The Respondent uses the IAS which generates a cost-based valuation. Tr. 87-88, 100.

21. DDD was qualified as an expert on behalf of the Respondent. Tr. 98.

22. Mr. DDD testified that only a sales validity code of "0" qualifies as an arm's-length transaction under the Tax Commissioner's Ratio Study. Tr. 115.

23. Mr. DDD testified that a sales validity code of "11" indicates a partial interest under the Tax Commissioner's Ratio Study. Tr. 115-116.

24. Mr. DDD testified that all five of the comparable properties were sold as partial sales, would not qualify as an arm's-length transaction, and therefore, were not valid sales. *Id.*

25. Mr. DDD testified that using invalid sales to generate a capitalization rate would also render the capitalization rate invalid. Tr. 119.

DISCUSSION

The issue in this matter is whether the Respondent has properly valued the AAA for the 2023 tax year. The Petitioner is a limited partnership that owns a commercial mall property in EEE, West

Virginia known as the AAA. The Petitioner filed a petition for property tax appeal on February 20, 2023, challenging the 2023 assessments for the AAA's *ad valorem* property taxes. The Petitioner seeks a reduction from the Assessor's valuation of \$XX to a value of \$XX based on Mr. CCC's appraisal. The Petitioner bases its appeal on the following:

- The market and income approaches are more appropriate than the cost approach to mall appraisal;
- That county assessor's comparable properties should not be limited to a specific county in West Virginia;
- That county assessors should not limit themselves to the cost approach for mall appraisals;
- That the 2022 Circuit Court appeal does not have any precedential or persuasive value for the purposes of the 2023 appeal; and
- Eminent domain

The Respondent counters with essentially two main arguments. First, the Petitioner's market sales approach is fatally flawed due to invalid comparable sales. This invalidates both the market and income approach, coupled with using estimated income numbers that were significantly underestimated by approximately one million dollars. Second, that the Petitioner's failure to include a cost approach does not overcome the Assessor's presumption of accuracy.

The Tax Commissioner shall have the power to "determine the methods of valuation for both real and personal property" which provides the authority to prescribe the methods for the valuation of real property under West Virginia Code Section 11-1C-5(a)². The Tax Commissioner is authorized

² The commercial property in this matter was appraised and assessed by the county assessor's office. However, all of the work done by the county assessors is overseen to some extent by the Tax Commissioner. There are numerous statutory provisions contained in Chapter 11 of the West Virginia Code which outline the working relationship between the two entities. *See e.g.*, W. Va. Code Ann. § 11-1C-7(a) (West) (county assessors shall appraise all real and personal property utilizing the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the Tax Commissioner.) As such, any references to the Tax Commissioner's mandatory duty to follow the directives of Series 1P flows to the county assessors as well. Additionally, assessors statewide utilize a computer program to value commercial property that is established and maintained by the West Virginia State Tax Department.

to promulgate rules for the valuation of real and personal property. Regulations which clarify and implement law relating to appraisal at market value of commercial and industrial real property confer upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties; the exercise of such discretion will not be disturbed upon judicial review, absent a showing of abuse of discretion. W.Va. Code St. R., §§ 110–1P–1, 110–1P–2. *Stone Brooke Ltd. P’ship v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009).

“[T]axation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.” W. Va. Const. art. X, § 1. Article 1C of Chapter 11 of the West Virginia Code follows this constitutional mandate, and is titled “Fair and Equitable Property Valuation”. Subsection (a) of Section 7, Article 1C, Chapter 11 follows the same through line, and directs assessors to “appraise all real and personal property in their jurisdiction at fair market value” W. Va. Code Ann. § 11-1C-7(a) (West). When it comes to valuing commercial property, such as the mall at issue in this matter, the Legislature has given the Tax Commissioner the authority to draft legislative rules. *See* W. Va. Code Ann. § 11-1C-5(b) (West). In West Virginia, properly promulgated legislative rules, that have gone through legislative rule making, have the force and effect of law. *See e.g., Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The Legislative Rules that control this matter are found in Section 3 of Series 1P, Title 110 of the West Virginia Code of State Rules. Subsection 3.1.1 states:

The market value of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell.

W. Va. Code R. 110-1P-3.1.1 (2013).

Section 3 provides specific direction as to how assessors are to value commercial property.

Under 110-1P-3.2.1, “In determining an estimate of fair market value, the Tax Commissioner shall consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market.” W.Va. CSR § 110-1P-3.2.1.

3.2.1.1. “Cost approach. - To determine fair market value under this approach, replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax Commissioner shall consider three (3) types of depreciation: physical depreciation, functional obsolescence, and economic obsolescence.”

3.2.1.2. “Income approach. - A property's present worth is directly related to its ability to produce an income over the life of the property. The selection of an overall capitalization rate shall be derived from current available market data by dividing annual net income by the current selling price of comparable properties. The present fair market value of the property shall then be determined by dividing the annual economic rent by the capitalization rate.”

3.2.1.3. “Market approach. - The Tax Commissioner shall apply the market approach by considering the selling prices of comparable properties.”

3.1.1. The market value of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell. In determining appraised value, primary consideration shall be given to the trends of price paid for like or similar property in the area or locality in which the property is situated. Additionally, for purposes of appraisal of any tract or parcel of real property used for commercial or industrial purposes, including chattels real, the appraisal shall consider the following factors:

3.1.1.1. The location of the property;

3.1.1.2. Its site characteristics;

3.1.1.3. The ease of alienation, considering the state of its title, the number of owners, and the extent to which the property may be the subject of either dominant or servient easements;

3.1.1.4. The quantity of size of the property and the impact which its sale may have upon surrounding properties;

3.1.1.5. If purchased within the previous eight years, its purchase price and the date of each purchase;

3.1.1.6. The recent sale of, or other transactions involving, comparable property;

3.1.1.7. The value of the property to its owner;

3.1.1.8. The condition of the property;

3.1.1.9. The income, if any, which the property actually produces and has produced within the preceding three (3) years; and

3.1.1.10. Any commonly accepted method of ascertaining the market value of the property, including techniques and methods peculiar to any particular species of property if the technique or method is used uniformly and applied to all property of like species.

3.2.2. Correlation. - Once generated, the Tax Commissioner may consider the various estimates of value in determining a final value estimate. However, the income approach is ordinarily inappropriate for properties such as franchised restaurants, governmental properties, hospitals, etc. In these cases, the cost or market approaches may be more suitable in estimating fair market value.

3.2.2.a. When possible, the Tax Commissioner should use the most accurate form of appraisal, but because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial or industrial properties, the choice between the alternative appraisal methods may be limited.³

³ This Tribunal has consistently considered the law in West Virginia to be that legislative rules that have gone through legislative rule making, are an act of the Legislature, no matter to what extent they were drafted by the executive branch. *See Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424

It is well settled in West Virginia that an Assessor's property valuations are presumed correct. *See, e.g.*, Syllabus pt. 1, *Berkeley County Council v. Government Properties Income Trust LLC*, 247 W. Va. 395, 880 S.E.2d 487 (2022); *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008); *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000); *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993); *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983); *Bankers Pocahontas Coal Co. v. County Court of McDowell County*, 135 W. Va. 174, 62 S.E.2d 801 (1950). Finally, H.B. 2581, passed in 2021, gave this Tribunal jurisdiction over property tax appeals, and additionally, changed the burden of proof in such appeals. Prior to its passage, the burden of proof for property owners to prevail in a property tax appeal was by clear and convincing evidence. Now the burden of proof in such appeals is a preponderance of the evidence. *See* W. Va. Code Ann. § 11-10A-10(h) (West) (For all appeals regarding property tax assessments, taxability, and classifications the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard.)

The Market Approach

The Petitioner's expert compared the AAA to malls from GGG, HHH, III, and Virginia. Pet'r's Ex. 1 at 73. The Respondent contends that because no local sales of malls exist in the EEE, West Virginia area, the market sales methodology cannot follow the mandates of W.Va. CSR 110-1P-1 and 3.2.2.a., and is one of the reasons that renders the Petitioner's market approach as being fatally flawed.

(1995)(being an act of the West Virginia Legislature, legislatively approved rules are entitled to more than deference, they are entitled to controlling weight.)

Under Section 3.2.2.a, when there is a “lack of comparable commercial or industrial properties, the choice between the alternative appraisal methods may be limited.” The Respondent contends that this regulation contemplates that a lack of comparable properties may render a market approach inappropriate in comparison to other methods because they are not in the subject area or locality.

However, the true issue with the comparable properties used by Mr. CCC lies with the validity of the sales, because none of the sales in his report sold an entire mall, irrespective of their out-of-state locations. The State Tax Commissioner issued the “Ratio Study” which contains several sales validity codes. *See* Resp’t’s Ex. 4. Only a sales validity code of zero designates an arms-length transaction that can be deemed a comparable sale in the Ratio Study. *Id.* Under the sales validity code 11-partial interest, a sale of a partial interest is not deemed to be a valid arm’s-length transaction capable of being a comparable sale. *Id.* Every single mall sale used in Mr. CCC’s report for the market approach was a sale of less than 100% of the total square footage, or the total footprint of the mall.

Conversely, the Petitioner takes the position that selling less than 100% of the comparable mall’s square footage does not constitute a partial sale because the seller owned 100% of the part that was actually being sold. Tr.142. Thus, the Respondent avers that under the Petitioner’s argument, a sale of 1% of a mall could be a valid comparable sale to establish the value of 100% of a mall because the sellers owned 100% of the 1% of the square footage that was sold. While the seller may very well sell 100% of what they own, a sale of 1% of a mall is not comparable to a sale of an entire mall. Moreover, the Respondent points to the testimony of Mr. CCC who confirmed this very issue.

ATTORNEY KKK: Mr. CCC, what does 49.8 represent for LLL Mall?

MR. CCC: That's how much of the mall itself was sold. Not the interest. They sold 100% of everything they owned in the mall.

Tr. 149.

Upon this Tribunal’s review of the arguments of counsel regarding the market approach used by the Petitioner, we find that the use of comparing out of state malls to be permissible under the under Section 3.1.1. As stated *supra*, the AAA’s expert compared five separate out of state malls to arrive at the 2023 appraisal. The regulation requires that “primary consideration shall be given to the trends of price paid for like or similar property in the area or locality in which the property is situated.” Section 3.1.1. The regulation states that “primary consideration” shall be given to property in the area or locality in which the property is situated. The regulatory language clearly states a preference for property in the area or locality to be utilized, however, this is not an absolute consideration. If there are no other malls being sold in BBB County, West Virginia then utilizing out of state “like or similar” properties appear to be permissible and is not a fatal flaw. However, the key in utilizing out of state properties is that they **must be** “like or similar” to the subject property.

The expert report shows the AAA of having a gross leasable area (hereinafter “GLA”) of 100% of the total mall and 100% of the anchor stores. Pet’r’s Ex.1 at 73. The percentage of the square footage of the entire mall actually sold for each asserted comparable sale in the 2023 appraisal for the malls and the anchor stores are as follows:

MMM (III)	% of Total Mall GLA sold is 84%
	% of Anchors in GLA sold 55.9%
LLL Mall (GGG)	% of Total Mall GLA sold is 49.8%
	% of Anchors in GLA sold is 8.7%
NNN Mall (Virginia)	% of Total Mall GLA sold is 49.7%
	% of Anchors in GLA sold 37.4%
OOO Mall (GGG)	% of Total Mall GLA sold is 57.9%
	% of Anchors in GLA sold is 42.2%

anchor stores, JC Penny, Dunham's Sports, and AMC Theater. *See* Pet'r's Ex. 1 at 73. The report included the anchor stores for the AAA but it excluded three anchor stores for the LLL Mall. The sale of a part of mall compared to 100% of the AAA is a partial sale and is not "like or similar" property under West Virginia's regulatory scheme. None of the malls in the expert's report were sold at 100% and three were sold at approximately 50% of the total mall property. *Id.*

The Petitioner contends that because the owners owned 100% of what they sold even though they may have only sold approximately 50% of the total mall square footage, that makes it a valid sale as defined under the Study and not a partial sale. However, the Petitioner does not cite to any statutory, regulatory, case law authority that supports this position. Comparing the sale of half of a mall with 100% of the AAA does not meet the requirement of a "like or similar" property under 3.1.1. Moreover, it is not a valid sale under the Study because the comparable properties are being sold in pieces while comparing it to a subject property of a 100%. This Tribunal is unpersuaded by the Petitioner's partial interest sale argument. The five malls are not comparable properties and are therefore unavailable as valid sales under the market approach. Accordingly, the Petitioner has failed to meet its burden by the preponderance of the evidence.

The Income Approach

The Petitioner argues that upon the "willing buyer/willing seller" standard to income-producing property, that both parties rely upon the property's earning power. As income-producing property is typically purchased as an investment, earning power is the critical element affecting property value according to *The Appraisal of Real Estate* p. 439 (Amer. Inst. Of Real Estate Appraisers, 14th ed. 2013). The Petitioner avers that the Respondent was provided information to create an income valuation for the subject property but once received the Respondent failed to even attempt to do a proper appraisal using the income approach. As support for this argument, the Petitioner relies on Mr. DDD not visiting the AAA or inquiring about the AAA's operations from

the property manager. The Petitioner further states that Mr. DDD did not attempt to determine the classification of the mall that AAA was considered.

The Respondent claims that he followed 110-1P-3.2.1., as mandated. He further avers that after he obtained the three recent years of the Petitioner's actual income, he used the income to correlate the value of the cost approach. The income approach method was not used by the Respondent under 110-1P-3.1.1., because he claims as with the market approach, that there were no available like or similar properties in the area or locality comparable to the AAA.

The Respondent invalidates the Petitioner's appraisal on two fronts. First, the invalidated comparable sales used in the market approach as discussed *supra*, are also utilized in the income valuation approach thus, they are equally tainted in the income analysis. As these invalid sales are used as a basis for the capitalization rate, they are also fatally flawed. Second, the Petitioner's income valuation includes estimated income that was significantly lower than the amount of the actual income under 110-1P-3.1.1.9. Under 110-1P-3.1.1.9, "for purposes of appraisal...the income the property actually produces and has produced within the preceding three (3) years... shall be considered" The Petitioner's estimated income for 2023 is inconsistent with the taxpayer's increasing actual income. The Petitioner's three preceding years of actual income used in the appraisal (rounded) were:

2020: \$XX;

2021: \$XX; and

2022: \$XX

Tr. 117.

The Petitioner's estimated income for 2023 was \$XX, which is lower than any of the undisputed, actual income amounts for the 2020, 2021, and 2022 tax years. Tr. 21-22, 117-118. As stated above, the actual income was going up significantly, but the estimated income is a much lower

number. For example, the most recent year's income in 2022 was approximately \$XX but the Petitioner's estimated income for 2023 was \$XX. Pet'r's Ex. 1 at 73. The actual income for the past three years shows an increase, not a decrease. The Petitioner's estimated number does not appear to comport with the recent income trends with the subject property. If the annual net income is inaccurate, then the capitalization rate will be flawed.

Furthermore, if the comparable properties are not valid sales, then the entire income methodology is untenable. As discussed *surpa*, the comparable sales were not arm's-length transactions due to them being compared to partial sales. In addition to the estimated income being grossly undervalued as compared to prior three years' actual income, this Tribunal finds that this estimate is unavailing to have an accurate capitalization rate under the income approach. Therefore, the requirements of 110-1P- 3.2.1.2 cannot be met under these facts. This Tribunal finds Petitioner's income approach unpersuasive and cannot meet its burden of proof.

The Cost Approach

The Petitioner's expert report did not include a cost approach in valuing the AAA because he didn't feel that it was a very accurate approach. Mr. CCC believes that the cost approach to valuing a property is best suited when the property is new, and the AAA was built in 1990. As such, he did not prepare an analysis of the cost approach as it applied to the subject property and only prepared a sales approach and an income approach. *See* Pet'r's Ex. 1, Tr. 37-38.

Furthermore, Mr. CCC did not appear to be fully aware of a recent West Virginia case regarding the valuation of shopping malls as set forth below:

ATTORNEY KKK: Okay. We have some West Virginia case law, and I cited this earlier, it's Mall versus Gearhart; have you ever seen the opinion issued by the West Virginia Supreme Court where they cited to the RRR County Commission for noting that the majority of Assessors in West Virginia utilize the cost minus depreciation method to arrive at an appraised value?

MR. CCC: Yes, I've heard that before.

ATTORNEY KKK: And you understand that to be an opinion issued by our highest court in West Virginia, correct?

MR CCC: It is, but I also understand too that the Assessors primarily appraised residential property, not commercial, not malls. And to blindly say that that would be the most appropriate way to value a property such as a regional mall, it's unheard of. It's not accurate.

ATTORNEY KKK: You do understand that that case involved the sale of a mall, correct?

MR. CCC: No, I did not know that resulted from the sale of a mall.

Tr. 64.

The above testimony concerns *Mall v. Gearhart* and 110-1P-1 *et seq.* The Respondent relies upon this case and argues that the Petitioner's failure to consider and use a cost approach fails to follow an "apples to apples" comparison to overcome the presumption of validity by the Assessor's mandatory use of the cost approach. The Supreme Court cited a preference for using the cost approach for commercial and industrial property in *Gearhart* which further notes that the income approach is typically only used for low-income housing, and not to assess other commercial properties. *Id.* at 3-4.

"Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion." Syllabus point 5, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d757(2000).

Mall v. Gearhart, No. 18-0213, 2019 WL 1110329, at *3 (W. Va. Mar. 11, 2019.)

Syl. Pt. 4, *Stone Brooke*. In light of this standard we decline to find that the circuit court erred in not compelling the Commission to use the income approach to valuation. It is well settled that, "[i]t is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear." Syl. Pt.7,

In re Tax Assessments Against Pocahontas Land Co., 172 W. Va. 53, 303 S.E.2d 691 (1983).

Id.

While the Petitioner's expert may believe that the cost approach is an inappropriate methodology and best suited for appraising new properties, it does not negate the mandate for West Virginia Assessors to prepare a cost approach analysis. *See* W.Va. CSR 110-1P-3.2.1. Mr. CCC is either not very apprised of West Virginia law and the role of Assessors here or he is aware and chooses to ignore it. He was also an expert in the Petitioner's 2022 Circuit Court case which will be discussed *infra*. In that case, he did not provide a cost approach analysis but instead provided only a market and income approach analysis. The Petitioner is attempting to challenge the Respondent's valuation and is fully aware that the Respondent utilized the cost approach, yet Mr. CCC still did not utilize it to rebut the Assessor's presumption of accuracy. This Tribunal can appreciate Mr. CCC's years of experience, education, and role as an expert but finds his rationale for not preparing a cost approach unpersuasive.

2022 BBB County Circuit Court Decision

The Petitioner argues that the BBB County Circuit Court decision involving the AAA's 2022 tax year valuation as not having any precedential or persuasive value for the purposes of the 2023 appeal. In the 2022 decision, the BBB County Circuit Court upheld the BBB County Assessor's 2022 valuation and ruled against the AAA. Despite the Petitioner receiving an adverse decision, it did not appeal this decision to a higher court.⁶ There was a good amount of argument during the evidentiary hearing over the relevancy of this decision due to it involving two separate tax years. This Tribunal is fully aware that under West Virginia law, each tax year is independent of prior tax years and

⁶ This Tribunal is aware that the standard of proof in the 2022 decision was a clear and convincing evidence standard and the burden of proof in the instant case is the preponderance of the evidence standard.

independent of subsequent tax years. *See* Syllabus Pt. 2, *Mountain America, LLC. v. Huffman*, 229 W.Va. 708, 735 S.E.2d 711 (2012).

The Respondent argues that although it is not binding precedent, the 2022 Circuit Court ruling is instructive. The Petitioner used the same appraiser, and the same two methodologies as presented in the instant case. In the 2022 Circuit Court Appeal, the Circuit Court found that the majority of sales used in the market analysis were not arm's-length transactions capable of being valid comparable sales under the Tax Commissioner's Ratio Study or the applicable regulations. Furthermore, because the capitalization rate in the prior appraisal's income valuation was tainted by invalid comparable sales, neither methodology was viable.

The 2022 valuation involved the same property, the AAA, and the exact same expert, Mr. CCC. The expert utilized the same methodologies, income and market, but again did not prepare a cost appraisal. The expert utilized different comparable properties in this matter than he used in the 2022 report, but the methodologies were the same. The Petitioner received an adverse ruling in the 2022 Circuit Court case. Notwithstanding that outcome, the Petitioner chose to follow the same methodologies for this case and did not apply the cost approach. This Tribunal is at a loss as to why the Petitioner would follow the same playbook that failed to provide a winning outcome. We acknowledge that this authority is not binding but find that it does have some persuasive value. Therefore, this Tribunal finds the Petitioner's argument regarding the 2022 BBB County Circuit Court decision to be unpersuasive.⁷

Eminent Domain

The Petitioner makes an argument for the first time in its post-hearing brief about the concept of eminent domain (i.e., a governmental taking of property for compensation). That

⁷ The Petitioner has an appeal pending before this Tribunal for the 2024 tax year that is currently in abeyance until the issuance of this decision.

argument essentially being that a taking has occurred for an overvalued property for purposes of increased taxes is the same as the exercise of eminent domain. According to the Petitioner, each of these situations are the taking of private property. While an interesting concept, the Petitioner never made this argument at the prehearing conference, in its prehearing statement, or during the evidentiary hearing. Accordingly, this Tribunal will not consider this argument upon hearing it for the first time in a post-hearing brief and finds that it is without merit.

Upon consideration of the evidentiary hearing testimony, the exhibits of the parties, the post-hearing briefs, and West Virginia law, this Tribunal finds that the Petitioner has not met its burden of proof under a preponderance of the evidence standard.

CONCLUSIONS OF LAW

Based upon all the above, it **FINDS** and **CONCLUDES** that:

1. Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. W. Va. Const. art. X, § 1.
2. The Tax Commissioner shall have the power to determine the methods of valuation for both real and personal property pursuant to West Virginia Code Annotated Section 11-1C-5.
3. The Integrated Assessment System provides the method by which local county assessors appraise residential real estate statewide. *See* Admin Notice 2018-15.
4. The Assessor's valuation of property for taxation purposes is presumed correct. *See, e.g.,* Syllabus pt. 1, *Berkeley County Council v. Government Properties Income Trust LLC*, 247 W. Va. 395, 880 S.E.2d 487 (2022); *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008); *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000); *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d

661 (1993); *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983); *Bankers Pocahontas Coal Co. v. County Court of McDowell County*, 135 W. Va. 174, 62 S.E.2d 801 (1950).

5. Each tax year is independent of prior tax years and independent of subsequent tax years. Syllabus Pt. 2, *Mountain America, LLC. v. Huffman*, 229 W.Va. 708, 735 S.E.2d 711 (2012) (“[T]he demand for the tax in the subsequent year being a different demand from that for the former”).

6. All hearings before the Office of Tax Appeals are held *de novo*. W.Va. Code § 11-3-25b (West 2021).

7. For all appeals regarding property tax assessments, taxability, and classifications pursuant to § 11-3-1 *et seq.*, the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard. W.Va. Code § 11-10A-10(h) (West 2021), W.Va. Code Ann. § 11-3-24(k) (West 2021).

8. In a hearing before the Office of Tax Appeals on a Petition for Property Tax Appeal, the burden of proof is on the Petitioner to show the BBB County Assessor’s actions are erroneous, unlawful, void or otherwise invalid. W.Va. Code Ann. § 11-10A-10(e) (West 2002), and W.Va. Code R. § 121-1-63.1 (West 2003).

9. The Petitioner has not met its burden of proof to show that the BBB County Assessor’s actions were erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the arguments of the parties, the exhibits of the parties, the hearing testimony, the post hearing briefs, and West Virginia law, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the valuation by the BBB County Assessor is hereby deemed correct and **AFFIRMED**.

WEST Virginia OFFICE OF TAX APPEALS

Crystal S. Flanigan
Deputy Chief Administrative Law Judge

Date